STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2004
v	No. 246722 Wayne Circuit Court
BOB WILLIAMS CLARK, Defendant-Appellant.	LC No. 02-003238-01

Before: Owens, P.J., and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of operating a chop shop, MCL 750.535a(2), and receiving and concealing stolen property over $1,000, but less than $20,000, MCL 750.535(3)(a), and from his sentence, as a fourth habitual offender, MCL 769.12, to 2 to 20 years' imprisonment and to a fine of $20,000. We affirm.

Defendant first contends that the trial court improperly interfered with defendant's cross-examination by making two sua sponte objections to a witness' testimony and that the court showed partiality to the prosecutor by assisting him with the questioning of police witnesses. We disagree.

Defendant did not object to any instances of the trial judge's behavior during or after the trial. Furthermore, defendant failed to move to disqualify the trial court for bias. MCR 2.003(C). Therefore, this issue is not preserved for appellate review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews unpreserved issues for plain error that affects the defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999). Defendant must establish that error occurred, show that it was plain or obvious, and demonstrate that the plain error affected his or her substantial rights; i.e., that "the error affected the outcome of the lower court proceedings." *Id.*, citing *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant has failed to set out the portions of the record where the trial court allegedly demonstrated partiality toward the prosecution. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990), citing *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In his statement of facts, defendant relates two instances where the trial court interrupted defense counsel's cross-examination to interpose what amounted to an objection.

"A trial court has broad discretion in regard to controlling trial proceedings." *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002), citing MCL 768.29; see also MCR 6.414(A) and MRE 611(a). With regard to the first interruption, the trial court properly restricted defendant's question in order to prevent defendant from attempting to elicit improper speculation regarding whether "somebody who doesn't know" could observe if a VIN plate was bent. Regarding the second interruption, the trial court properly prevented defense counsel from, in effect, arguing his case to the jury. The trial court first observed that defense counsel's question was repetitive (the previous questions having sufficiently revealed that neither the VIN plate nor a photograph of it was being admitted so the only evidence of the condition of the plate was the officer's testimony), and then commented that what the jury would be permitted to see was not up to counsel or the officer.

We conclude that the trial court's observations were appropriate and the court acted properly by restricting defense counsel's cross-examination to relevant and material matters so as to avoid presenting improper information to the jury. Therefore, defendant has failed to establish plain error. Furthermore, defendant has failed to establish that, even if the interruptions constituted plain error, such error affected the proceedings. The court's interjections were proper and they were brief. Because the questioning did not concern matters directly impacting on defendant's guilt or innocence, we conclude that, even if error occurred, it was not determinative of the outcome of the proceedings. Therefore, defendant has failed to demonstrate plain, outcome-determinative error and his claim is accordingly meritless.

With regard to defendant's claim that the trial court assisted the prosecutor, defendant does not indicate where in the record this alleged assistance occurred. This Court has been unable to locate anywhere in the record that the trial judge interjected himself into the proceedings and "assisted" the prosecutor. "An appellate court cannot review matters effectively which are presented to it inadequately." *People v Nathaniel Johnson,* 113 Mich App 414, 421; 317 NW2d 645 (1982).

Finally, with regard to his initial claim, defendant appears to argue that the trial judge was not impartial. However, aside from the examples of the trial court's interjection of two sua sponte objections, defendant has failed to offer any evidence demonstrating that the trial judge was biased or that he exhibited partiality toward the prosecutor.[1] Therefore, this issue is waived. *People v Griffin,* 235 Mich App 27, 45; 597 NW2d 176 (1999).

Defendant next contends that the prosecutor failed to present sufficient evidence of the essential element of the stolen car's value. This Court reviews claims regarding the sufficiency of the evidence to determine if, when viewed in a light most favorable to the prosecution, the

[1] We note that during the prosecutor's cross-examination of defendant, the trial court interjected its own objection to stop the prosecutor from getting into a argument with defendant. This indicates that the trial court was not biased in favor of the prosecutor and that the court was an "equal interrupter."

evidence was sufficient to permit a rational trier of fact to conclude that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The value of stolen property is one of the essential elements of receiving and concealing stolen property over the value of $1,000 and less than $20,000. *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002). In *Pratt, supra* at 429, this Court stated:

> An owner of a car is qualified to testify about the value of his property unless his valuation is based on personal or sentimental value. *People v Watts*, 133 Mich App 80, 84; 348 NW2d 39 [(]1984). The phrase "personal value" means subjective value to the owner, or a value that cannot be objectively substantiated. *People v Dyer*, 157 Mich App 606, 611; 403 NW2d 84 (1986).

The owner testified that although he purchased the vehicle for $550, he subsequently spent a considerable amount fixing it up. He claimed that he installed a Pioneer car stereo worth $150; a $250 stereo amplifier, a set of $100 speakers, exhaust headers costing $110, a $300 dual exhaust system, $100 rocker panels, and new tires and rims; the rims alone had cost $944.28. He admitted he did not have receipts for these items at the time of trial. The owner estimated the car's value as approximately $3,000 at the time it was stolen. He acknowledged that it might have had over 100,000 miles on it, but it had a rebuilt engine and he had done some sheet metal work on it to repair some rusted body metal. He further stated that the vehicle was not insured and that he did not reclaim the car from the police impound lot because "It's not really worth anything."[2] We interpret this statement as reflective of the car's condition at the time it was recovered – not at the time it was stolen.

There is no indication that the owner's estimate was based on personal or sentimental value. Rather, it appears that the estimate was an attempt to reflect the value added to the vehicle by the owner after it was purchased. "Generally, proof of value is determined by reference to the time and place of the offense." *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984), citing *People v Cole*, 54 Mich 238; 19 NW 968 (1884); also *Pratt, supra* at 429, citing *Johnson, supra*. The jury could reasonably accept the owner's testimony that at the time the vehicle was stolen, it was worth more than $1,000. When considered in a light most favorable to the prosecution, the jury could also reasonably conclude that the car had a value over $1,000 when defendant came into possession of it, but that defendant had already removed some of the items that gave the car added value, such as the stereo and the wheel rims. We therefore conclude that the prosecutor presented sufficient evidence from which the jury could conclude that the value of the stolen vehicle was greater than $1,000.

[2] On the other hand, defendant testified that he estimated the value of the car at $600; he claimed it was not in drivable condition. Defendant claimed that when it was brought to his house, the car "looked like something that was set up for parts." Defendant also asserted that the car did not have a stereo or any rims.

Defendant next contends that the trial court improperly permitted the prosecutor to impeach him with a similar prior conviction. MRE 609(a).[3] Defendant did not object to the use of his prior convictions for impeachment and therefore failed to preserve this issue for appellate review. *Carter, supra* at 214. This Court reviews unpreserved issues for plain, outcome-determinative error. *Carines, supra* at 763.

Because there was no objection by the defense, the trial court never performed the balancing test of MRE 609(a)(2)(B). Regarding the balancing test, MRE 609(b) provides:

> For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The trial court did not "articulate, on the record, the analysis of each factor." Nevertheless, this Court may perform its own analysis to determine whether defendant has satisfied the plain error requirements. The conviction occurred ten years before the trial, so its probative value was reduced by its age because it was at the far limit of the ten-year cutoff provided by the rule. MRE 609(c); *People v Allen*, 429 Mich 558, 612; 420 NW2d 499 (1988) (eight-year-old conviction "was of relatively late vintage"). Because the conviction dealt with the reception, possession, and concealment of stolen property, it involved an element of dishonesty that was indicative of defendant's veracity. *Allen, supra* at 610-611 (breaking and

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[3] MRE 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

entering an occupied dwelling with intent to commit a larceny is a theft crime that "is moderately probative of veracity"). Defendant testified, so there was no effect on the decisional process resulting from a decision by defendant not to testify in order to avoid impeachment. Finally, and critically, according to the prosecutor's own characterization, the previous offense was "just like" the one defendant was charged with. This similarity is a factor that argues against admission of the evidence. *Allen, supra* at 611-612 ("the similarity of the prior convictions to the charged crime was highly prejudicial").

We therefore conclude that the admission of defendant's prior conviction for receiving and concealing stolen property was improper. The conviction was relatively old, the probative value was only moderate, and, although defendant did testify, the prejudice from admitting a very similar offense was high.[4] Therefore, although the admission of evidence is considered under an abuse of discretion standard, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), and decisions on close evidentiary questions do not normally amount to an abuse of discretion, *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000), we conclude that application of the balancing test suggests that the prior similar receiving and concealing stolen property conviction should not have been permitted for impeachment.

Nevertheless, in order to establish plain error, defendant must demonstrate that the error affected his substantial rights; i.e., that it prejudiced him by affecting the outcome of the proceedings. *Carines, supra* at 763. The error resulting from the unchallenged admission of the receiving and concealing conviction for impeachment did not affect defendant's substantial rights. Defendant was properly impeached with his previous forgery conviction and he gave a statement to the police admitting that he possessed the stolen vehicle. Furthermore, defendant was not dissuaded from testifying so he was able to place his version of the events before the jury for their consideration. The evidence of the stolen cars being found in defendant's back yard, the condition of the cars (suggesting that they were stolen vehicles), and defendant's incriminating statements constituted strong evidence of his guilt. For these reasons, we conclude that the admission of the prior receiving and concealing conviction was not outcome-determinative error.

Finally, defendant contends that the trial court erred by sentencing him to a minimum sentence outside the range recommended by the sentencing guidelines. This Court reviews the trial court's sentence for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002), citing *Cain, supra* at 130. An abuse of discretion is indicated if the sentence is not "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant contends that the sentencing guidelines recommended a minimum sentence range of 0 to 17 months. This, however, was the recommended minimum sentence range for the

[4] In fact, at the very conclusion of his rebuttal argument, the prosecutor argued that, contrary to defendant's argument, he knew the car was stolen because "[t]his is the mechanic, who oh by the way has already been convicted of this crime. He knows all about stolen cars. He's in the business."

chop shop conviction and the trial court sentenced defendant within that range to a one-year minimum sentence. The trial court then vacated that sentence and replaced it with an enhanced habitual sentence. The record indicates that the court, the probation department representative, the prosecutor, and defendant agreed at sentencing that the minimum sentence range recommended by the sentencing guidelines for the habitual enhanced minimum sentence was 0 to 34 months. Defendant's fourth habitual minimum sentence of two years' imprisonment is within that range.

This Court is required to affirm sentences that are within the guidelines range unless there is an error in scoring the sentencing guidelines or the sentencing court relied on inaccurate information in determining the sentence. *People v Leversee*, 243 Mich App 337, 348; 624 NW2d 479 (2000). Therefore, because the trial court's minimum sentence was within the sentencing guidelines range and defendant has not alleged either an error in scoring the guidelines or that inaccurate information was relied on in determining the sentence, this Court must affirm the trial court's sentence. *Id.*, citing MCL 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentencing range, the court of appeals shall affirm the sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.").

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs